No. 10,303

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WASHINGTON BREWERS INSTITUTE, REGAL AMBER BREWING COMPANY, WILLIAM P. BAKER, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

CLOSING BRIEF FOR APPELLANTS, REGAL AMBER BREWING COMPANY AND WILLIAM P. BAKER.

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CLOSING BRIEF FOR APPELLANTS, REGAL AMBER BREWING COMPANY AND WILLIAM P. BAKER.

The appellants, Regal Amber Brewing Company and William P. Baker, submit this as their closing brief of the argument in support of their appeal.

RESTATEMENT OF THE QUESTION INVOLVED.

The appellee's brief sums up the contention of these appellants (Appellee's Brief p. 6) as follows:

> "2. That the Sherman Act is not applicable to the commerce involved in the combination charged

in the indictment because of certain state laws existing in the states of the Pacific Coast Area."

"3. That the indictment does not allege facts showing that interstate commerce has been directly affected."

The foregoing is not wholly correct and to clarify our position we restate that the contention of these appellants is, that intoxicating liquors, even when moving in interstate commerce, *under the facts stated in the indictment,* are no longer subject to the power of the federal government *with reference to the matters charged in the indictment.*

The appellee does not appear to question the proposition stated in our opening brief (p. 7):

"It is well settled, therefore, that if the subject matter of the alleged conspiracy, *does not relate to and act upon* interstate commerce, then it is *not* within the terms of the Sherman Act."

It is our contention that the conspiracy and acts charged in the instant indictment relate to the *sale and distribution of a commodity which must, as a matter of law, be treated like articles in intrastate commerce,* not like articles of interstate commerce; that by reason of the Twenty-first Amendment to the Constitution of the United States, and by reason of the laws of Congress, notably the Webb-Kenyon Act and the Wilson Act, heretofore cited and quoted in our opening brief, the subject matter of the alleged conspiracy is subject to the laws of the respective states. The alleged conspiracy is to be tested as to its legality only by those state laws, since the alleged conspiracy does not act

upon and embrace interstate commerce. In this respect the traffic in intoxicating liquors is distinct from trade and commerce in all other commodities, because other commodities have not been dealt with by the Constitution and by Congress in the same manner.

REPLY TO APPELLEE'S ARGUMENT.

These appellants will not attempt to reply to all of the points raised by appellee but only to those that seem to attempt to answer questions raised by these appellants in their opening brief. The remaining points will, without doubt, be capably and convincingly answered by the other appellants herein.

POINT I OF APPELLEE'S ARGUMENT IS NOT AN ACCURATE OR TRUE STATEMENT OF THE LAW.

POINT I OF APPELLEE'S ARGUMENT STATES (Brief p. 8) THAT "THE TWENTY-FIRST AMENDMENT DOES NOT DEPRIVE THE UNITED STATES OF THE POWER TO REGULATE INTERSTATE COMMERCE IN INTOXICATING LIQUOR WHEN SUCH COMMERCE IS CARRIED ON WITHOUT VIOLATION OF STATE LAWS".

The foregoing is the major premise upon which appellee's argument is based. Unless the Federal Government and the States have concurrent power to regulate or prohibit the sale of intoxicating liquors, the major premise of appellee falls and with it its entire case.

When the proposed constitutional amendment was introduced in Congress it contained three sections.

Sections 1 and 2 are now Sections 1 and 2 of the Twenty-first Amendment. The proposed Section 3 provided:

> "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquor to be drunk on the premises where sold."

In the consideration of the proposed amendment much of the debate in the Senate and in the House was devoted to this Section 3. It was contended that Section 3 was inconsistent with Section 2. As expressed by Senator Blaine, who was in charge of the bill in the Senate:

> "The purpose of Section 2 is *to restore to States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors* which enter the confines of the States * * * My view therefore is that Section 3 is inconsistent with Section 2, and the two Sections are incompatible and that Section 3 ought to be taken out of the resolution." (Italics ours.)
>
> 76 Cong. Rec. 4143.

The entire subject of congressional debates on the amendment resolution are discussed later in this brief, but we feel that what is said here, while not controlling in construing a constitutional amendment, does indicate the "temper of the times" and to some extent the object to be attained upon adoption of the amendment.

Section 3 of the proposed amendment was stricken from the resolution and the amendment was submitted in the form in which it was adopted and now con-

stitutes the Twenty-first Amendment to the Constitution.

The Wilson Act (26 Stat. 1890, p. 313; 27 U. S. C. A. Section 121) was entitled "An act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases". It provided that intoxicating liquors transported into any state or territory or remaining therein for use, consumption, sale or storage therein,

> "shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in like manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The Wilson Act was supplemented by the Webb-Kenyon Act (37 Stats. 1913, p. 699; 27 U. S. C. A. Section 122). This latter act was entitled "An Act divesting intoxicating liquors of their interstate character in certain cases".

It provides that the shipment or transportation of any intoxicating liquor from one state or territory to another, or from a foreign country, which is intended by any person interested therein to be received, possessed, sold or used in violation of any law of such state or territory, is prohibited.

The Twenty-first Amendment to the Constitution settled the questionable constitutionality of the Webb-Kenyon Act and gave it sanction.

How, under the foregoing, can the Sherman Act, as claimed by appellee, be said to act upon a commodity which the law has particularly and definitely declared to be a domestic product.

In *James Clark Distilling Company v. Western Maryland R. Co.* (1916), 242 U. S. 311, 61 L. Ed. 326, the Court said (at p. 325):

> "The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state having been in express terms devested by the Webb-Kenyon Act of their interstate commerce character, * * * there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the constitution."

These appellants have never contended that the Twenty-first Amendment of the Constitution divested the federal government of all power of control over intoxicating liquors moving in interstate commerce, but we do contend that intoxicating liquors, even when moving in interstate commerce, under the facts stated in the indictment herein, are no longer subject to the power of the federal government, with reference to the matters charged in the indictment, and this contention we believe we have conclusively maintained in our opening brief.

THE UNITED STATES SUPREME COURT AND OTHER FEDERAL COURTS DO AFFIRM CONTINUING AUTHORITY OVER INTERSTATE COMMERCE IN LIQUOR, BUT APPELLEE QUOTES NO DECISION THAT SUPPORTS THE INSTANT INDICTMENT.

The first clause of the foregoing paragraph is appellee's subheading A.

We do not feel that this heading requires extended discussion.

Appellee quotes the case of *Arrow Distilleries Inc. v. Alexander,* 109 F. (2d) 397.

In this case, the right of Congress to require a permit of one engaging in rectifying, distilling and bottling alcoholic liquors in *interstate trade* was upheld.

What support can that case give to the appellee's position in the instant case? Or how can it in any way controvert these appellants' contentions as to the applicability of the Sherman Act to the facts charged in the instant indictment.

The case of *Wm. Jameson Inc. v. Morgenthau,* 307 U. S. 171, is also cited and quoted from by appellee in support of the point now under discussion. (Appellee's brief p. 10.)

This case involved a shipment of alcoholic beverages from a foreign country to the United States and its entrance opposed upon the ground that it violated the labeling provisions of the Federal Alcohol Administration Act (27 U. S. C. A. Section 205). The importer contended that Twenty-first Amendment to the Constitution gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause. As this question was one dealing entirely with *foreign commerce* and did not in any way involve importation into any state the Supreme Court correctly stated, "We see no substance in this contention".

We are at a loss to understand the relevancy of this citation to the question at issue in the instant case. It seems to us that the issue raised in the *Jameson* case was silly because it is plain that the Twenty-first Amendment was not intended to and did not affect federal control over importations into its borders from foreign countries under the provisions of the commerce clause of the U. S. Constitution "To regulate commerce with foreign nations * * *". What that amendment did modify was the portion of the same section of the Constitution "To regulate commerce * * * among the several states". (U. S. Const., Art. I, Sec. 8, Clause 3.)

The case of *Hayes v. U. S.* cited and quoted from (Appellee's brief p. 10) add nothing to the strength of appellee's contention under this head. It simply held that Congress "has the power to enact legislation to execute the Amendment (21st Amendment) and penalize its violation". (Quotation from Appellee's brief p. 11.)

LEGISLATIVE HISTORY OF TWENTY-FIRST AMENDMENT.

Under subdivision B of Point I of appellee's brief (p. 16) is the heading:

> *"B. Legislative History of the Twenty-first Amendment Indicates Intent to Preserve Federal Authority Over Interstate Commerce in Liquor."*

This portion of appellee's brief is not addressed to anything contained in our opening brief but we believe it merits at least passing attention and we must

also give particular attention to matter appearing under this heading which is pertinent, perhaps, to the general discussion but has no relation to the subject heading of this portion of appellee's brief. We refer here to matter appearing on pages 20 to 22 of appellee's brief.

First, as to the discussion of the proposed amendment in the United States Senate.

In the Court below the appellee first raised this question of legislative intent and we fully discussed it there. But we were puzzled then and we are now at the appellee's object in raising the question when an examination of the Senate discussion, as appears in the files of the 76th Congressional Record, shows conclusively that the intent of that body was to take federal government out of any control, other than enforcement of the amendment, of the traffic in intoxicating liquors.

Reluctantly we feel it necessary to repeat here a brief outline of the discussion before the United States Senate.

The Twenty-first Amendment was before Congress as Senate Joint Resolution No. 211. Senator Blaine was in charge of this resolution. The resolution was referred to the Committee on Judiciary of which Senator Blaine was a member.

The committee revised the resolution and reported favorably. (76 Cong. Rec. 1621.) The report contained no discussion. Senator Blaine made an oral committee report to the Senate.

Senator Blaine first gave a history of legislation enacted prior to the adoption of the Eighteenth Amendment, which was designed to increase state power over alcoholic beverage control. He then stated (76 Cong. Rec. 4141):

> "So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.
>
> Mr. President, the pending proposal will give the States that guarantee. When our Government was organized and adopted, *the States surrendered control over and regulation of interstate commerce. This proposal is restoring to the States,* in effect, *the right to regulate commerce respecting a single commodity*—namely, *intoxicating liquor.* In other words, the State is not surrendering any power that it possesses but rather, by reason of this provision, in effect *acquires powers* that it has not at this time. * * *
>
> Now, Mr. President, I think I have set forth * * * the view of the committee as expressed in this joint resolution." (Italics ours.)

The resolution approved by the committee was substantially the same as the amendment finally passed. There was in addition a Section 3 which read as follows:

> "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquor to be drunk on the premises where sold." (76 Cong. Rec. 1661.)

Most of the debate in the Senate and in the House was over these two questions:

1. Whether or not Section 3 should remain or should be stricken; and

2. The mechanics by means of which the amendment was to be approved by the States.

Section 2, of course, is the same section that is now Section 2 of the Twenty-first Amendment.

Senator Blaine continued with his own views (76 Cong. Rec. 4143):

> "Mr. President, my own personal viewpoint upon Section 3 is that it is contrary to Section 2 of the resolution. I am now endeavoring to give my personal views. The purpose of Section 2 is *to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors* which enter the confines of the States. The State under Section 2 may enact certain laws on intoxicating liquors, and Section 2 at once gives such laws effect. Thus the States are granted larger powers in effect and are given greater protection, while under Section 3 the proposal is to take away from the States the powers that the States would have in the absence of the eighteenth amendment. My view therefore is that Section 3 is inconsistent with Section 2, and the two sections are incompatible and that Section 3 ought to be taken out of the resolution." (Italics ours.)

Section 3 was taken out of the resolution. Thereafter on a motion to reconsider the matter the following statements were made (76 Cong. Rec. 4225):

> "Mr. Swanson (Senator from Virginia). Consequently, it is left entirely to the States to determine *in what manner intoxicating liquors shall*

> *be sold or used* and to what places such liquors may be distributed. Is that established definitely under Section 2 of the proposed amendment?" (Italics ours.)

Senator Robinson (Arkansas), who had the floor and to whom the question was addressed, responded:

> "I think that is true."

Mr. Robinson continued:

> "The language of Section 2 is perfectly plain." (The Senator here quoted the Section.) "That leaves to the States the power of regulation; it places the moral force of the Government of the United States behind the States in the enforcement of their laws; and that is exactly what we on this side of the Chamber are committed to in so far as we can be committed by a platform declaration."

Do these debates support the contention of these appellants?

Let us read again the statement that, "when our Government was organized and adopted, the States surrendered control over and regulation of interstate commerce", and that the Twenty-first Amendment was adopted for the purpose of "restoring to the States, in effect, the right to regulate commerce respecting a single commodity—namely, intoxicating liquor". This is precisely the argument, almost word for word, as formulated by these appellants in their opening brief! This is precisely the opinion of the Court in *Joseph S. Finch & Co. v. McKittrick* (1938), 23 Fed. Supp. 244 (affirmed in 305 U. S. 395, 83 L. Ed. 246), where the Court said, at page 245:

> "So far as that one commodity is concerned, the nation again is in that same situation in which it was as to all commerce before the adoption of the Constitution."

We come now to that portion printed under this subheading of appellee's brief (p. 20) though having no direct relation to it.

The appellee here offers what may be accurately termed an argument of fear by asserting to the Court, in substance, that, should the appellants' contention herein be sustained, entire federal jurisdiction over the liquor industry would be lost. Among the federal laws which would be imperiled by the contention of the appellants are The Federal Alcohol Administration Act, The Collier Act, The Liquor Enforcement Act of 1936, the Federal Trade Commission Act, and the Securities Act of 1933. That such a proposition does not follow either as a matter of law or of logic is too plain to merit extensive discussion.

It was not, and is not, the intention of these appellants to argue the application of every conceivable phase of federal law to the liquor industry. These appellants are indicted for violation of Sections 1 and 3 of the Sherman Antitrust Act, and it is the application of *that* law, and none other, which need be argued here.

The sole apparent motive of the appellee, in attempting to argue the application of every possible federal law to the liquor industry, is to becloud the issue involved in the present appeal, so that this Court may be led to believe that these appellants are, in substance,

asking this Court to rule that, since the adoption of the Twenty-first Amendment, *no federal law applies to the liquor industry.*

Such is not the contention of these appellants. They recognize that if they issue their securities in interstate commerce the Courts might hold them subject to the Federal Securities Act of 1933. They recognize that should they engage in deceptive trade practices they might be subjected to the jurisdiction of the Federal Trade Commission. They recognize that the Federal Government may ultimately be held to have power, irrespective of the Twenty-first Amendment, to establish labeling standards for liquors moving in interstate commerce, and to require a rectifier's permit from them if they engage in interstate trade. The reason these appellants have not heretofore engaged in a dissertation upon these laws is that these laws are not involved in the present case.

Is it inconsistent for these appellants to acknowledge possible federal power over the issuance of their securities, their trade practices, or the labeling standards of their goods (where the liquor moves in interstate commerce) and still to deny that the Sherman Antitrust Act applies to them? Certainly not.

In the discussion of the historical development of the status of intoxicating liquors as an article of commerce among the several states, appearing at pages 9 to 27 of our brief, we pointed out that, upon the enactment of the Twenty-first Amendment, the commerce clause of the Federal Constitution was qualified and limited as far as intoxicating liquors are con-

cerned, and that such liquors were removed from the operation of the commerce clause where the state had adopted laws regulating the importation and sale of such intoxicating liquors. Under the express terms of Section 2 of the Twenty-first Amendment, state law determines the terms and conditions of "importation" and of "delivery" or the "use" of intoxicating liquors imported into the state.

If state law is to be paramount with respect to *importation, delivery* and *use* of liquor, the state must have exclusive jurisdiction over those matters which are *indispensable attributes* to the regulation of such "importation", "delivery" or "use". What power must a state have if it is to regulate properly the delivery and use of liquors within its borders?

Indispensable to such regulation is the power, unfettered by the commerce clause, to say *who* shall consume intoxicating beverages, *where* such intoxicating beverages may be consumed, when such intoxicating beverages may be consumed, *how much* of said beverages may be consumed, and the *prices* at which such beverages are to be sold. Given these powers, a state can adequately govern the liquor industry within its borders. Lacking any of these powers, a state would be helpless to deal with the liquor trade. If, for example, a state could say who could drink, where, when, and how much, but could not say at what price the liquor should be sold (whether at high or low prices, posted prices, open prices, monopoly prices, etc.), its regulation of liquor would be fatally defective.

It is clear that the distinction between the legislative power to require certain types of labels (upon bottles of intoxicating liquor moving in interstate commerce) is substantially different from the legislative power to require that the prices for such intoxicating liquor be, or be not, set through certain methods and operations. The *inherent necessities* of the duty, placed upon the states under the Twenty-first Amendment, of regulating the liquor traffic require that, among other things, the states have the power to determine the method by which prices for such liquor shall be set. Whether such prices shall be set by state decree, by open competition, or any other method is a matter for the state to determine.

We have wandered far afield. We would not choose to do so had not the appellee's brief attempted to argue these collateral points, in speculating as to what action Courts would take in cases different from the case now specifically before this Court. These appellants do not, however, mean to recede from their stand that the only question before this Court is whether the Sherman Antitrust Act applies to the acts alleged in the indictment.

Before leaving this phase of the subject, another wholly different aspect of the Federal Alcohol Administration Act (27 U. S. C. A. Sec. 205), involved in the *Jameson* and the *Arow Distilleries* cases, should also be mentioned. Subsection (a) of that act prohibits "exclusive outlets"; subsection (b) prohibits "tied houses"; subsection (c) prohibits "commercial bribery"; subsection (d) prohibits "consignment

sales"; subsection (e) regulates labeling; subsection (f) regulates advertising.

In each subsection the requirement is that the prohibited act must be done *"in the course of interstate or foreign commerce"*.

Subsections (a) to (d) inclusive are applicable

> "to transactions between a retailer or trade buyer in any State and a brewer, importer, or wholesaler of malt beverages outside of such State *only to the extent* that the law of such State imposes similar requirements with respect to similar transactions between a retailer or trade buyer in such State and a brewer, importer, or wholesaler of malt beverages in such State, as the case may be." (Italics ours.)

From the foregoing, it is apparent that the Federal Alcohol Administration Act does not supersede state regulations but is in aid of them because it is made applicable only to the extent that the state has adopted similar regulations of malt beverages. It is in connection with malt beverages that these defendants are indicted.

As respects subsections (e) and (f), the Act provides as follows:

> "In the case of malt beverages, the provisions of subsections (e) and (f) shall apply to the labeling of malt beverages sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, or the advertising of malt beverages intended to be sold or shipped or delivered for shipment or otherwise introduced into or received in

> any State from any place outside thereof, *only to the extent* that the law of such State imposes similar requirements with respect to the labeling or advertising, as the case may be, of malt beverages not sold or shipped or delivered for shipment or otherwise introduced into or received in such State from any place outside thereof." (Italics ours.)

Again we find the Federal Government making its law applicable as respects malt beverages only where the state has similarly acted.

The argument of the appellee seeks to show that, if the proposition of the appellants be true, that the acts of which they are accused in the indictment are not punishable under the Sherman Act, then the appellants are not subject to the Federal Trade Commission Act, the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utilities Holding Act or the Federal Alcohol Administration Act because such acts were enacted by Congress under power derived from the commerce clause.

That argument of the appellee, if carried to its logical conclusion, would be tantamount to a statement by the appellee that the second section of the Twenty-first Amendment to the Constitution was absolutely meaningless, and that, notwithstanding the Twenty-first Amendment, Congress was free to regulate the transportation and importation of liquors in interstate commerce in precisely the same way it was prior to the adoption of the Eighteenth Amendment.

Merely to state the proposition is to prove its absurdity. Indeed, the appellee's argument proves too much. To illustrate: Section 1 of the Twenty-first Amendment repealed the Eighteenth Amendment. If the Twenty-first Amendment had stopped there, the power of Congress to regulate the liquor traffic commerce would be exactly what it was prior to the adoption of the Eighteenth Amendment. But the Twenty-first Amendment does not stop there. Section 2 of the Twenty-first Amendment says:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Now those words of Section 2 must mean something. Prior to the adoption of the Eighteenth Amendment, no state, irrespective of its regulatory laws, could prevent or regulate the transportation or importation into its borders for delivery or use therein of intoxicating liquor except as permitted so to do by the Webb-Kenyon Act or the Wilson Act.

However, upon the adoption of the Twenty-first Amendment, that amendment became paramount law and the Congress no longer had the power to require the state to admit intoxicating liquors into its borders for delivery or use therein in contravention of its laws, something Congress could require prior to the adoption of the Eighteenth Amendment. If this is true, and every decision of the United States Courts says it is, it follows irresistibly that Section 2 of the

Twenty-first Amendment is a limitation of the power of Congress under the commerce clause.

STATES OF THE PACIFIC COAST AREA HAVE COMPREHENSIVE LEGISLATION RESPECTING INTOXICATING LIQUORS.

Under Title II, the appellee's brief (p. 22) states:

> *"II. The Laws of the States of the Pacific Coast Area do not Affect the Applicability of the Sherman Act in the Instant Case."*

Under this title, appellee's brief (p. 22) says:

> *"A. State Legislation Relating in a General Way to Liquor Distribution does not Divest the Federal Government of Jurisdiction Over Interstate Commerce in Intoxicating Liquors."*

So far as these appellants are concerned their contention is that each of the states comprising the Pacific Coast Area and the Territory of Alaska has a complete and comprehensive set of special and general laws regulating the manufacture, use, sale, exportation and importation of beer within, and from, and into its borders, and also has laws forbidding restraints of trade or commerce and the fixing or maintaining of artificial or non-competitive prices of commodities generally, but applicable to beer and other intoxicating liquors. (Appellants' brief, p. 5, and the appendix to said brief.)

The foregoing is far different from appellee's misleading statement in its brief at page 22, "that appellants contend that upon enactment by the states of the Pacific Coast Area of general legislation concerning the distribution of intoxicating liquors, the Fed-

eral Government was thereupon divested of all jurisdiction under the commerce clause over commerce liquors".

Again, on pages 25 and 28 of its brief, appellee seeks to convince this Court that the state laws referred to are only general and not specific and comprehensive laws passed solely for the control of traffic in intoxicating liquors in the several states.

Appellee then again refers to the *Jameson* case, heretofore discussed, "to defeat the contention" of appellants as to operation of State laws. In this reference (appellee's brief, p. 23) the appellee deliberately misstates the facts involved in the *Jameson* case by saying "In that case, the Government sought to exercise jurisdiction over *the importation of liquor into the State of New York, where comprehensive state legislation relating to liquor had been enacted*". (Italics ours.)

The *Jameson* case, *Wm. Jameson v. Morgenthau*, 307 U. S. 171, 83 L. Ed. 1189, came before the U. S. Supreme Court on appeal from a three judge district court judgment. The appeal was brought under 28 U. S. C. A. Sec. 380a on the theory that the constitutionality of the Federal Alcohol Administration Act was involved because it was alleged that the Twenty-first Amendment to the Constitution withdrew from Congress the authority to control *the importation of intoxicating liquors into the United States.*

The only point considered by the Court was the question of its jurisdiction to hear the appeal on its

merits. It decided that it lacked such jurisdiction but exercised its power to vacate the judgment of the Court below and remanded the case to the District Court for further proceedings to be taken independently of the section of the code referred to above.

There is not one word in the opinion about an importation into the State of New York or any other State than the United States itself. The suit was brought against the Secretary of the Treasury of the United States to enjoin interference with the importation of plaintiff's goods into the United States—*not New York.*

In view of the foregoing, it seems to us that appellee must be most fearful of the weakness of its argument in this case when it feels compelled to stoop to the attempted deception of opposing counsel and this Court in an effort to make a strong, supporting opinion out of one which has no bearing whatsoever on the contentions raised in the instant case.

So far as appellee's comments on our brief at page 25 of its brief are concerned, we believe that since appellee has not deemed it worth while to point out where our brief, pages 28-37, incorrectly stated the legal principles involved, we are not called upon to lengthen this brief by repeating or enlarging upon what we have already said as that is a complete answer to the contentions of appellee on this point.

Answering appellee's contention, page 27 of its brief, that our statement on page 38 of our brief that all of the states in the Area have "adopted laws

against restraint of trade and commerce", which are applicable to the distribution of beer, supports appellee's contention that since there is no conflict between these laws and the Sherman Act, that the latter, because there is no apparent conflict, prevails, we would call attention to the fact that under the Twenty-first Amendment where a state has undertaken by a comprehensive statute to regulate the traffic in intoxicating liquors, including the transportation and importation into that state, and in addition has legislation covering the very same field as that covered by the Sherman Act, to wit: the states' statutes prohibiting restraint of trade; then matters indispensably a part of the regulation of the delivery and sale of such liquors are not the proper subject of regulation by Congress under the commerce clause. In the field covered by the State laws affecting alcoholic liquors, the State laws are paramount. Federal and State power over commerce is not and cannot be concurrent. If the State is given power over the transporation, importation and sale of intoxicating liquors, including the power to define and control competition, under the Twenty-first Amendment, then the commerce power of Congress over the same subject matter is necessarily withdrawn. That is what the decisions of the Supreme Court say. (See our brief p. 28, et seq.)

The appellee, page 32 of its brief, invites the Court's attention to part of Section 22 of Article XX of the California State Constitution and implies that this section of the Constitution is the basis of all California liquor legislation, and further points out that that

constitutional provision specifically provides that the power of the State of California to regulate intoxicating liquors shall be "subject to the internal revenue laws" and "subject to the laws of the United States regulating commerce between foreign nations and among the states".

The proviso in that section of the California Constitution announces a limitation well settled in constitutional law; a limitation that is read into every statute passed by every state on every subject regardless of any state constitutional provision. The power of the State of California to legislate concerning liquor would be no more enlarged in scope by an omission of that limitation than it would be limited by being made expressly subject to all of the delegated powers of the Federal Government.

Under the title (p. 33 of Appellee's Brief):

> *"III. The Indictment Sufficiently Alleges a Restraint which Directly Affects Interstate Commerce."*

The appellee first quotes a statement from our brief (p. 39—really p. 40) in reference to the facts alleged in the indictment constituting a violation of the Webb-Kenyon Act. We are satisfied to stand on the complete statement as found on page 40 of our brief. As to the remainder of the argument of appellee under this title we feel that our brief is a sufficient answer.

As to Title V of appellee's brief, page 38, we only wish to point out that appellee's reference to or quotations from our brief either twist the meaning or by

quoting a few words from a paragraph make a deduction which is contrary to real intent of the whole paragraph. The purpose of these appellants in pointing to statutes of the Pacific Area States forbidding restraints of trade and commerce or the fixing or maintaining of artificial or non-competitive prices of commodities, including in their scope intoxicating liquors, was to point out to the Court that the State having occupied the field, and the State law under the Twenty-first Amendment being paramount, the Sherman Act could not in any way enter that field. Not at any rate under the facts stated in the instant indictment.

COUNT TWO OF THE INDICTMENT.

We feel it unnecessary to repeat our remarks on this count of the indictment as found in our brief, page 41. The same argument applies to this count as to Count One and having pointed out in our opening brief that the Territory of Alaska has a complete set of laws regulating the manufacture, use and sale of beer within its borders, of which this Court will take judicial notice, and furthermore has adopted the common law as respects restraints of trade and commerce, it follows that the Territorial laws, under the Twenty-first Amendment, are paramount and exclusive of the laws of the Federal Government on the same subject, consequently we urge that Count Two does not charge a public offense under Section 3 of the Sherman Act.

CONCLUSION.

We do not find anything in the arguments contained in appellee's brief that in any way offsets or contradicts our contentions as set forth in our opening brief and we therefore respectfully renew our prayer that the judgments of the Court below be reversed.

Dated, San Francisco, California,
April 7, 1943.

Respectfully submitted,
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